No.

In the Supreme Court of the United States.

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

Scott Harshbarger
Attorney General
of Massachusetts

Paula J. DeGiacomo*
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826

*Counsel of Record

QUESTION PRESENTED

Whether the decision below requiring effective assistance of counsel prior to the commencement of adversary proceedings is in conflict with decisions of this court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Rules and Statutes

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

ROGER MOREAU,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

OPINION BELOW

The opinion of the court below (Appendix A) is reported at 30 Mass. App. Ct. 677, 572 N.E.2d 1382, app. rev. denied, 410 Mass. 1104, 577 N.E.2d 309 (1991).

JURISDICTION

The decision of the court below was entered on June 14, 1991. The

Commonwealth petitioned for further appellate review, which was denied on July 30, 1991. 410 Mass. 1104, 577 N.E.2d 309 (1991). (Appendix B). The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). The Commonwealth's Motion to Stay Proceedings in the Superior Court until this Court takes final action in this case was allowed on October 24, 1991. (Appendix D).

CONSTITUTIONAL PROVISIONS INVOKED

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Prior Proceedings

On October 2, 1985, at 11:30 p.m., defendant Roger Moreau was arrested in connection with the break-in of a house in Warren, Massachusetts.

On Thursday, October 4, 1985, he was arraigned in Spencer District Court.

On January 15, 1986, a Worcester County Grand Jury indicted the defendant for the offenses of armed burglary, assault and battery, and assault and battery by means of a dangerous weapon.

On April 24, 1986, the defendant entered pleas of guilty on all of the indictments which were accepted by the Superior Court, Donohue, J. The court imposed concurrent sentences of twelve to twenty-five years for the armed burglary and nine to ten years for the assault and battery by means of a dangerous weapon.

Id. at 681. The assault and battery indictment was filed.

On April 23, 1990, the defendant filed motions to withdraw the guilty pleas and for an evidentiary hearing. On June 15, 1990, the court, Donohue, J., denied the motions without a hearing and issued a Memorandum of Law and Order of Decision on Defendant's Motion for New Trial. (Appendix C).

The Massachusetts Appeals Court ruled that a defendant under arrest but not yet arraigned who made statements to the police upon the advice of and in the presence of counsel, was entitled to the effective assistance of counsel, to protect his Fifth Amendment privilege against self-incrimination under Miranda v. Arizona, 384 U.S. 436 (1966). Commonwealth v. Moreau, 30 Mass. App. Ct. 677, 679, 682, 572 N.E.2d 1382, 1383-1385 (1991).

The court vacated the trial court's order and remanded the matter for proceedings consistent with the opinion. 30 Mass. App. Ct. at 684, 572 N.E.2d at 1386 (1991). The Massachusetts Supreme Judicial Court denied the Commonwealth's petition for further appellate review on July 30, 1991. (Appendix B). 410 Mass. 1104, 577 N.E.2d 309 (1991).

Statement of Facts

On October 2, 1985 at 11:30 p.m., defendant Roger Moreau was arrested by Springfield police in connection with a break-in of a house in Warren, Massachusetts. He was in custody overnight and on October 3, 1985. 30 Mass. App. Ct. at 679, 572 N.E.2d at 1383. (App. C). On Wednesday, October 3, 1985, Moreau was brought to Spencer District Court where he first met with his lawyer. (App. C). The lawyer had

come to the courthouse with his then client Ralph Carron, who was also Moreau's brother-in-law and co-defendant. (App. C).[1/]

At Spencer District Court, counsel spoke separately with Carron, Moreau and the police. (App. C). The police outlined for counsel the case against both Carron and Moreau, describing the circumstances of the assault. (App. C). After discussing the case with the Warren police, Mr. Fitzgerald became aware of "the serious nature of the cases" and advised each defendant separately to make a statement to the police. 30 Mass. App. Ct. at 679, 572 N.E.2d at 1384. After counsel advised the codefendant Carron to cooperate with the police, Carron made a

---

1/ Ralph Carron also pled guilty to charges arising out of the same incident and his motions for new trial were denied. 24 Mass. App. Ct. 1105 (1987); 29 Mass. App. Ct. 1105 (1990).

statement implicating himself, the defendant, and a third individual. Id., 572 N.E.2d at 1384. Mr. Fitzgerald then told the defendant "that the police were well aware of all facts connected with their case even prior to [the codefendant's] written statement." Id. at 680, 572 N.E.2d at 1384. As a result of counsel's advice, the defendant also made a statement to the police. Id., 572 N.E.2d at 1384. Mr. Fitzgerald was present while each defendant made his statement. Id., 572 N.E.2d at 1384.[2/]

2/ In his affidavit, in support of his Motion for New Trial, the defendant alleged that the police told him that the only way he could be released that day would be to give the police a statement and that his counsel "told me it would be in my best interest to make a statement and that it might result in a low bail." Id. at 680. The defendant also alleged that his counsel never discussed with him the nature or sufficiency of the Commonwealth's case, never told him that

(footnote continued)

The defendant was arraigned on Thursday, October 4, 1985.[3/] The defendant was subsequently indicted on charges of armed burglary, assault and battery and assault by means of a dangerous weapon. Id. at 678, 572 N.E.2d at 1383. On April 24, 1986, the date set for trial in Superior Court, the defendant entered pleas of guilty on all charges acknowledging satisfaction with counsel's advice and representation.

(footnote continued)

there might be a conflict of interest arising out of the joint representation of the codefendant and himself, and never informed him that by making a statement he would be relinquishing his right against self-incrimination or that his statement would be sufficient for conviction. Id.

3/ Although the date of arraignment is not specified in the trial court's or the appellate court's findings, it is part of the record below.

(Appendix C); Id. at 681, 572 N.E.2d at 1385.[4/] He was sentenced to a term of twelve to twenty-five years' imprisonment on the burglary conviction pursuant to an agreed recommendation and to a concurrent term of nine to ten years on the charge of assault and battery by means of a dangerous weapon. Id. at 681, 572 N.E.2d at 1384-1385.

The Superior Court denied defendant's motion for withdrawal of his pleas finding that: counsel's initial advice was not beyond the realm of reasonable conduct if, as counsel stated in his affidavit, the police had a strong case against Moreau and that after the statement had been given it was not

---

4/ In defendant's Motion for New Trial, he also alleged he was denied effective assistance of counsel at the plea and sentencing.

unreasonable to recommend a plea. Id., 572 N.E.2d at 1385.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW REQUIRING EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO THE COMMENCEMENT OF ADVERSARY PROCEEDINGS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The court below ruled that a defendant under arrest but not yet arraigned who made statements to the police upon the advice of and in the presence of counsel, was entitled to the effective assistance of counsel to protect his Fifth Amendment privilege against self-incrimination under Miranda v. Arizona, 384 U.S. 436 (1966). Commonwealth v. Moreau, 30 Mass. App. Ct. at 679, 682, 572 N.E.2d at 1383-1385. The court remanded the matter to the trial court to determine whether counsel's advice to cooperate with the

police was effective and ordered the trial court to conduct an evidentiary hearing to determine what the attorney knew of the strength of the Commonwealth's case at the time of defendant's statement and what independent investigation counsel conducted to verify it. Id. at 683 & n.4; 572 N.E.2d at 1386 & n.4.[5/]

5/ The instant case is final for purposes of 28 U.S.C. §1257 as it falls within one of the well-established exceptions to the finality doctrine. Pennsylvania v. Ritchie, 490 U.S. 39, 47-49 (1987); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-485 (1975). There is finality despite the ordering of further proceedings in state court. If the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted. Id. at 481; New York v. Quarles, 467 U.S. 649, 651 n.1 (1984); Pennsylvania v. Ritchie, 490 U.S. at 47-49. Here, as in Ritchie, if the Commonwealth is successful at the evidentiary hearing, the issue will be mooted. If the Commonwealth loses, although it has a right to appeal a grant of a motion for new trial, Mass. R. Crim. P. 30, the Commonwealth courts have

(footnote continued)

Despite clear federal and state law to the contrary, the lower court found irrelevant whether the Sixth Amendment had attached or not because it concluded that defendant had a Fifth Amendment right to counsel and any right to counsel requires that counsel be effective. Id. at 679; 572 N.E.2d at 1384. The Court reached this result, Moreau, 30 Mass. App. Ct. at 679, 682, 572 N.E.2d at 1383-1384, by mistakenly relying on Escobedo v. Illinois, 378 U.S. 478, 488 (1964) and United States v. Gouveia, 467 U.S. 180, 188 n.5 (1984).[6/]

(footnote continued)

already resolved the issue against the Commonwealth. This court does not require the Commonwealth to "raise a fruitless Sixth Amendment claim in the . . . Superior Court and the Supreme [Judicial] Court still another time." Ritchie, 480 U.S. at 48-49 n.7.

6/ Escobedo held that a suspect in police custody who made incriminating

(footnote continued)

The lower court has entirely misconceived both the text of the Fifth

---

(footnote continued)

statements prior to adversary judicial proceedings had been denied "the Assistance of Counsel in violation of the Sixth Amendment to the Constitution." Escobedo, 378 U.S. at 488. Gouveia, 467 U.S. 188 at n.5, which was specifically cited by the lower court, makes clear that the right to counsel recognized in Escobedo was only to protect the Fifth Amendment right against self-incrimination. However, the lower court relied on an incorrect understanding of Escobedo and Gouveia read together to conclude that Escobedo still required effective assistance of counsel, but under the Fifth Amendment. See Michigan v. Long, 463 U.S. 1032, 1040-1043 & n.7 (1983).

In addition, the lower court provided no clear and express statement that the decision rests upon adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1041-1042 (1983). The only state cases it relied on, Moreau, 30 Mass. App. Ct. at 679, 572 N.E.2d at 1383-1384, either explicitly hold that there is no right to effective assistance of counsel after complaint and arrest, Commonwealth v. Stirk, 392 Mass. 909, 913, 467 N.E.2d 870, 873-874 (1984) or hold that a state statute confers a right to effective assistance of counsel. Commonwealth v. Griffin, 404 Mass. 372, 375, 535 N.E.2d 594, 596 (1989); Care and Protection of Stephen, 401 Mass. 144, 149, 514 N.E.2d 1087, 1090-1091 (1987).

and Sixth Amendments and this Court's jurisprudence concerning the very different purposes of these two Amendments. See McNeil v. Wisconsin, 111 S.Ct. 2204, 2208 (1991). The lower court has improperly combined the two of them and ordered an evidentiary hearing on the "effectiveness of counsel" prior to arraignment, purportedly guaranteed by the Fifth Amendment. This result is in direct conflict with decisions of this Court.

Rather than providing support for the proposition that defendant is entitled to "effective assistance of counsel" under the Fifth Amendment, Gouveia reiterates the firmly-established rule, Kirby v. Illinois, 406 U.S. 682, 688 (1972), that the federal constitutional right to effective assistance of counsel is derived solely from the Sixth Amendment and attaches only at or after the time

that adversary judicial proceedings have been initiated against a defendant. Gouveia, 467 U.S. at 189, quoting Kirby v. Illinois, 406 U.S. 682, 688 (1972); Moran v. Burbine, 475 U.S. 412, 430-431 (1986). This is so because the "core purpose" of the Sixth Amendment is to assure that in any "criminal prosecution[ ]," U.S. Const., Amdt. 6, the accused shall not be alone in facing the intricacies of the law and the advocacy of the public prosecutor. Gouveia, 467 U.S. at 189; Moran v. Burbine, 475 U.S. at 430. "It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of

substantive and procedural law.'" United States v. Gouveia, 467 U.S. at 189, quoting Kirby v. Illinois, 406 U.S. at 689. Although a complaint and arrest warrant had been issued against the defendant prior to the time he made his statements, this does not constitute the commencement of "adversary judicial proceedings" in Massachusetts. Commonwealth v. Jones, 403 Mass. 279, 286, 526 N.E.2d 1288 (1988); Commonwealth v. Smallwood, 379 Mass. 878, 884, 885, 401 N.E.2d 802, 806-807 (1980).[7/] Rather, it is at arraignment, Mass. R.

7/ Arrest warrants may be issued by district court judges, and by a clerk or assistant clerk. Mass. Gen. Laws c. 218, §§32, 33. The procedure is informal and a felony suspect has no right to be heard in the proceedings. Mass. Gen. Laws c. 276, §22. Because there is no right to a hearing, a fortiori, counsel is not required at this stage to protect the suspect against any potential abuses of the criminal process. Commonwealth v. Smallwood, 379 Mass. at 884-885, 401 N.E.2d at 806-807.

Crim. P. 7(a)(1) at which the Sixth Amendment attaches. Id., Commonwealth v. Key, 19 Mass. App. Ct. 234, 237-239, app. rev. denied, 394 Mass. 1101, 472 N.E.2d 1381, 1384-1385 (1985).

In stark contrast to the Sixth Amendment right to effective assistance of counsel, the right to have counsel present during custodial interrogation is a "prophylactic rule," Solem v. Stumes, 465 U.S. 638, 644, 645 (1984), of Miranda v. Arizona, 384 U.S. 436 (1966) -- the sole purpose of which is to protect a suspect's Fifth Amendment right against compelled self-incrimination and to prevent "coerced" or "involuntary" statements in police-initiated interrogation. Edwards v. Arizona, 384 U.S. 436, 484 (1981); Moran v. Burbine, 475 U.S. at 430-431; Michigan v. Jackson, 475 U.S. 625, 638-639 (1986); McNeil v. Wisconsin, 111 S.Ct. at 2208. Its

purpose "is to protect a quite different interest: the suspect's 'desire to deal with the police only through counsel.' Edwards, 451 U.S. at 484, 101 S.Ct. at 1884." McNeil v. Wisconsin, 111 S.Ct. at 2208-2209. Its purpose is emphatically not "to provide a defendant with a pre-indictment private investigator, . . ." Gouveia, 467 U.S. at 191, as the lower court has required. Moreau, 30 Mass. App. Ct. at 679, 682 & n.4, 572 N.E.2d at 1386 & n.4.

Once a suspect has invoked his Miranda right to counsel, the sole issues open for inquiry are whether the police honored defendant's invocation and whether any incriminating statements were voluntary. As the overarching purpose of the Fifth Amendment is to protect a suspect from police coercion, Miranda v. Arizona, 384 U.S. at 484; Oregon v.

Bradshaw, 462 U.S. 1039, 1044 (1983), and to assure that the suspect is guaranteed, if he chooses, to deal with police only through counsel, the effectiveness of counsel in advising his client to make a statement to the police is of no significance. Here, Moreau's statement resulted not from his being denied counsel, but from actually having received the advice of counsel, followed counsel's advice to cooperate with the police, and did so in counsel's presence. See Gray v. Rose, 627 F. Supp. 7, 10-11 (D. Tenn.), aff'd, 779 F.2d 50 (6th Cir.), cert. denied, 476 U.S. 1184 (1985). The Fifth Amendment requires no more.

If a defendant elects to retain private counsel at a point when counsel is not constitutionally guaranteed, and that private counsel is ineffective or "betrays" the defendant, the defendant

cannot allege that his Sixth Amendment rights have been infringed upon. Brown v. United States, 551 F.2d 619, 620-621 (5th Cir. 1977).

> Indeed, before commencement of prosecution neither law enforcement officials nor the courts have any reason to be aware of the ineffectiveness of a person's lawyer, or any obligation to remedy such ineffectiveness. Moreover, before a criminal prosecution has begun the State has no means of ensuring that a person has "the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69.

People v. Claudio, 466 N.Y.S.2d 271, 273-274, 453 N.E.2d 500, 503 (1983); United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980). Here, the criminal prosecution against Moreau did not commence until he was arraigned on October 4, 1985.[8/]

8/ Defendant argued, for the first time on appeal, that his Sixth Amendment right

(footnote continued)

During this period of time, between arrest and arraignment, neither the police nor the courts have the means or a

---

(footnote continued)

to counsel should be deemed to have attached on October 3, 1985 because he should have been arraigned on the day following his arrest on October 2, 1985 at 11:30 p.m.

However, defendant never argued in his Motion for New Trial, either that arraignment was delayed or that it was unreasonable or purposeful on the part of the government. Commonwealth v. Hodgkins, 401 Mass. 871, 876-878, 520 N.E.2d 145, 148-149 (1988); Commonwealth v. Cote, 386 Mass. 354, 361 n.11, 435 N.E.2d 1047, 1051 (1982). In fact, to do so would be inconsistent with the position he took. He claimed in his affidavit in support of his Motion for New Trial that counsel did not provide effective assistance when counsel, during the course of the day, urged the defendant and Carron to make written statements to the police to avoid high bail for defendant. Counsel made the same allegations in his affidavit. Moreau, 30 Mass. App. Ct. at 679, 572 N.E.2d at 1384-1385. (Appendix C). Defendant's consultation with counsel on October 3, 1985 is consistent with the preferred practice in the Commonwealth to postpone arraignment until the defendant has a meaningful opportunity to consult with counsel. Reporter's Notes, Mass. R. Crim. P. 7(a)(1).

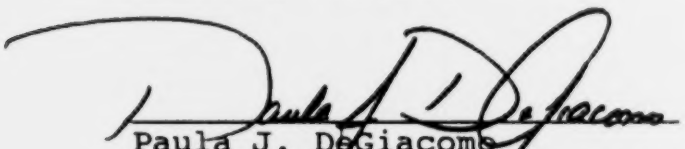
constitutional duty to supervise and determine the effectiveness of counsel's advice. The lower court decision in essence requires this as a matter of federal constitutional law; a requirement which has no basis in law or policy. See McNeil v. Wisconsin, 111 S.Ct. 2204 (1991).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General



Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826

4463J

APPENDIX A

30 Mass. App. Ct. 677

COMMONWEALTH vs. ROGER MOREAU.

No. 90-P-975

Worcester, February 12, 1991-June 14, 1991.

Present: Dreben, Jacobs, & Greenberg, JJ.

INDICTMENTS found and returned in the Superior Court Department on January 15, 1986.

A motion for leave to withdraw pleas of guilty, and for a new trial, was considered by James P. Donohue, J.

Daniel J. O'Connell, III, for the defendant.

Claudia R. Sullivan, Assistant District Attorney, for the Commonwealth.

Dreben, J. On October 3, 1985, while the defendant and a codefendant were in custody on account of a break-in of a house in Warren, counsel, who represented both of them, advised each of them to

make statements to the police. Both made written statements implicating the other and setting forth in detail their involvement in the incident. The defendant was subsequently indicted on charges of armed burglary, assault and battery, and assault and battery by means of a dangerous weapon. On the date set for trial, April 24, 1986, the defendant's counsel, who no longer represented the codefendant, advised the defendant to plead guilty saying, so it is alleged, "The statements you made will convict you." The defendant pleaded guilty to all charges, and after a colloquy with the judge, his pleas were accepted. A sentence in excess of the guideline (see Superior Court Sentencing Guidelines, 1980) was imposed on the most serious charge in accordance with a joint recommendation of the defendant's counsel and the prosecution.

Asserting that his plea had been involuntary and the result of ineffective assistance of counsel, the defendant filed a motion in April, 1990, accompanied by affidavits, including one from his former counsel, to vacate his guilty pleas and for a new trial. He also asked for an evidentiary hearing. This appeal stems from the denial of that motion by the motion judge (who was also the judge who had accepted the pleas) on the basis of the affidavits alone. We consider that the defendant has raised substantial issues which require an evidentiary hearing. Accordingly, we remand the matter for further proceedings. See Commonwealth v. Stewart, 383 Mass. 253, 260 (1981); Fogarty v. Commonwealth, 406 Mass. 103, 110-111 (1989); Commonwealth v. Meggs, 30 Mass. App. Ct. 111, 114 (1991). Cf. also United States v. Giardino, 797 F.2d 30,

31, 32-33 (1st Cir. 1986); Hernandez-Hernandez v. United States, 904 F.2d 758, 761 (1st Cir. 1990); but see n.3, infra.

There are basically three claims of ineffective assistance: poor advice prior to trial, poor advice at the plea stage, and inappropriate action at sentencing. The first question is whether, as the Commonwealth argues, the defendant's written statement was made before the right to counsel attached. If so, the defendant's claim fails because the right to effective assistance of counsel is only as broad as the right to counsel on which it rests. Commonwealth v. Jones, 403 Mass. 279, 286 (1988).

At the time of the statement, the defendant had been arrested and was in custody, but had not been arraigned. Since initiation of adversary judicial criminal proceedings had not commenced, a right to counsel under the Sixth

Amendment to the United States Constitution may not yet have matured. United States v. Gouveia, 467 U.S. 180, 188 (1984). Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980). Commonwealth v. Stirk, 392 Mass. 909, 913 (1984). Commonwealth v. Jones, 403 Mass. at 286-287.

The defendant was, however, entitled to the aid of counsel to protect his Fifth Amendment privilege against self-incrimination under Miranda v. Arizona, 378 U.S. 436 (1966). United States v. Gouveia, supra at 188 n.5. See Commonwealth v. Stirk, supra at 913. Cf. Commonwealth v. Griffin, 404 Mass. 372, 375 (1989). Since "a right to counsel is of little value unless there is an exception that counsel's assistance will be effective," Id. at 374, quoting from Care and Protection of Stephen, 401 Mass. 144, 149 (1987), the defendant's claim of

ineffective assistance of counsel must be examined.

We take our facts from the findings of the judge, supplemented by some uncontroverted statements in the affidavits. After the defendant was arressted by Springfield police on October 2, 1985, he was held overnight, during which time, he claims, police officers urged him to admit his involvement in the break-in, but he refused to comply. The following morning, he was taken to Spencer District Court. An account of what happened there is set forth in an affidavit of his former counsel, Mr. John F. Fitzgerald. After discussing the case with the Warren police, Mr. Fitzgerald became aware of "the serious nature of the cases" and advised each defendant "that unless he made a statement it was [counsel's] judgment that a high bail was likely to

be imposed." He added that "[t]he authorities were pressing me to advise both persons to make a complete disclosure of their involvement." After counsel advised the codefendant to cooperate with the police, the codefendant made a statement implicating himself, the defendant, and a third individual. Mr. Fitzgerald then told the defendant "that the police were well aware of all facts connected with their case even prior to [the codefendant's] written statement." As a result of counsel's advice, the defendant also made a statement to the police. Mr. Fitzgerald was present while each defendant made his statement.

In his affidavit, the defendant contends that the police told him that the only way he could be released that day would be to give the police a statement. Mr. Fitzgerald "told me it

would be in my best interest to make a statement and that it might result in a low bail." The defendant also stated that Mr. Fitzgerald never discussed with him the nature or sufficiency of the Commonwealth's case, never told him that there might be a conflict of interest arising out of the joint representation of the codefendant and himself, and never informed him that by making a statement he would be relinquishing his right against self-incrimination or that his statement would be sufficient for conviction. Moreover, during the period between his arraignment and his guilty plea, Mr. Fitzgerald never discussed "the strengths or weaknesses of the Commonwealth's case nor did he ever discuss the filing of any motion to suppress [the defendant's] statement or any other trial strategy."

When the defendant arrived at Superior Court for trial in Worcester on April 24, 1986, Mr. Fitzgerald advised him that there was no point in taking the case to trial, saying, "The statements you made will convict you." When the defendant asked if the trial could be postponed in order to allow him some time to collect his thoughts, Mr. Fitzgerald responded, "The trial begins today. Your only choice is to plead guilty." Mr. Fitzgerald did not deny any of these allegations, and only stated in his affidavit that he had counselled the defendant to plead guilty to the offenses.

The defendant withdrew his not guilty pleas and entered pleas of guilty on all charges. Following a colloquy during which the defendant acknowledged the factual basis of his pleas and stated that he was satisfied with Mr. Fitzgerald's advice and with the amount

of time counsel had spent in preparation for trial, he was sentenced to a term of twelve to twenty-five years' imprisonment on the burglary conviction (a term in excess of the guideline) pursuant to an agreement between Mr. Fitzgerald and the prosecution and to a concurrent term of nine to ten years on the charge of assault and battery by means of a dangerous weapon.[1/]

In denying the defendant's motion for withdrawal of his pleas, the judge ruled that the defendant had met neither prong of the test of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).[2/] He

---

1/ The indictment charging assault and battery was placed on file, the defendant not objecting.

2/ In Saferian, Justice Kaplan stated the test to be as follows: "[W]hat is required in the actual process of decision of claims of ineffective assistance of counsel . . . is a

(footnote continued)

concluded as to counsel's behavior under the first prong:

> "If, as Fitzgerald stated in his affidavit, the police had a strong case against Moreau, the initial advice to give a statement was not necessarily beyond the realm of reasonable attorney conduct. After the statement had been given, it was not unreasonable for Fitzgerald to recommend that Moreau plead guilty."

The judge found not credible Mr. Fitzgerald's statements that he had advised both clients to make a statement in order to avoid a high bail or that the police had pressured him to have the defendants make a statement.

Based on the plea colloquy during which the defendant had "repeatedly affirmed his satisfaction with the advice

---

(footnote continued)

discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence."

of counsel and his understanding of the proceedings," the judge found the defendant's subsequent account of his attorney's shortcomings "totally lacking in credibility." He had, therefore, in the judge's view, failed to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead insisted on going to trial."

Both conclusions made by the judge were reached too summarily on this record. Without knowing the strength of the evidence the police had at the time, no assessment of the reasonableness of counsel's advice to confess can be made. Circumstances favoring a confession to police are rare, and such advice may constitute ineffective assistance of counsel. See United States v. Frappier, 615 F. Supp. 51, 52-53 (D. Mass. 1985). See also People v. Wilson, 133 A.D.2d

179, 180-181 (N.Y. 1987). As stated by Justice Jackson, "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Escobedo v. Illinois, 378 U.S. 478, 488 (1964), quoting from Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

The record contains no indication of the strength of the Commonwealth's case without the confessions. Where, as here, the claim of ineffective assistance is based on counsel's advising a defendant to confess, reliance on an affidavit of the same counsel to the effect that he told the defendant that the police were "well aware of all facts connected with their case" is insufficient, without more, to warrant a denial of the defendant's motion.

Similarly, the present state of the record does not support the judge's conclusory finding that the second prong of the Saferian test, 366 Mass. at 96, has not been met. In this context, whether the behavior of counsel has "likely deprived the defendant of an otherwise available substantial ground of defence," means whether the defendant would not have confessed or pleaded guilty but for the advice. See Hill v. Lockhart, 474 U.S. 52, 56, 59 (1985). Commonwealth v. Stirk, 392 Mass. at 912-913. See also Smith, Criminal Practice and Procedure § 1231 (1983).

"Because the competency of counsel affects the determination of voluntariness, entry of a guilty plea cannot constitute a waiver of the defendant's right to assert that he was incompetently advised." Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302, 304

(1980). "[T]he barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." Blackledge v. Allison, 431 U.S. 63, 74-75 (1977). "Viewed in light of what [the defendant] says he knew at the time of the plea hearing, the statements he made then cannot be said to 'conclusively contradict' what he says now. They therefore cannot make otherwise ineffective assistance effective." United States v. Giardino, 797 F.2d at 32 (both Blackledge and Giardino were habeas corpus cases).[3/]

3/ The habeas corpus statutes applicable to both Federal (28 U.S.C. § 2255 [1988]) and State prisoners (28 U.S.C. § 2243 [1988]) see Blackledge v. Allison, 431 U.S. at 74 n.4, facially are more generous in favoring hearings than is Mass. R. Crim. P. 30(c)(3), 378 Mass. 901 (1979).

Accordingly, the matter is remanded for an evidentiary hearing as to the strength of the Commonwealth's case at the time of the defendant's statement. If, based on the evidence, the advice was "behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," the judge should determine whether the guilty pleas were influenced by this and subsequent actions of counsel. If both parts of Saferian are met, the judge should consider the remedy to which the defendant is entitled. See Commonwealth v. Stirk, 392 Mass. at 913, as to the possibility of suppressing the statement. Cf. United States v. Frappier, 615 F. Supp. at 53. Cf. also Commonwealth v. Allen, 395 Mass. 448, 456 (1985); Commonwealth v. Gallagher, 408

Mass. 510, 515 (1990).[4/]

At the evidentiary hearing on remand, the judge should also consider the defendant's assertion that his attorney did not tell him prior to sentencing that he -- the lawyer -- had agreed with the prosecution to a joint recommendation of twelve to twenty-five years and did not inform him of the opportunity to present mitigating circumstances. While Mr. Fitzgerald gave the judge information

---

4/ In determining whether Mr. Fitzgerald's advice was reasonable, it is not sufficient to inquire as to what he was told by the police. He would also have had to undertake some investigation as to the basis of the information given. See Commonwealth v. Haggerty, 400 Mass. 437, 443 (1987).

The evidentiary hearing may also encompass such other matters as the judge determines relevant, including whether there was a potential conflict of interest which prejudiced the defendant. Such prejudice would be shown if it was to the interest of the codefendant, but not the defendant, to make a statement. See Commonwealth v. Griffin, 404 Mass. at 377.

that might have mitigated the defendant's punishment (the defendant had no prior record and was allegedly merely a follower of his codefendant, who was the ringleader), the force of his presentation was vitiated because it came after he had submitted the joint recommendation of twelve to twenty-five years. Cf. Commonwealth v. Lykus, 406 Mass. 135, 146 (1989).

The order denying the defendant's motion to withdraw his guilty pleas and for a new trial is vacated, and the matter is remanded to the Superioor Court for proceedings consistent with this opinion.

So ordered.

APPENDIX B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Office of the Clerk, 1412 Court House,
Boston, MA 02108 (617) 725-8055

FAR-5792 July 30, 1991

COMMONWEALTH
vs. ROGER MOREAU

The above-captioned Application for Further Appellate Review is DENIED.

Jean M. Kennett
Clerk

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CRIMINAL ACTION
Nos. 86-111225,
86-111226,
86-111227

COMMONWEALTH

vs.

ROGER MOREAU

MEMORANDUM OF LAW AND ORDER OF DECISION ON DEFENDANT'S MOTION FOR A NEW TRIAL

Roger Moreau has entered pleas of guilty in these cases to indictments charging him with armed burglary, assault and battery by means of a dangerous weapon, and assault and battery. Presently, before the court is Moreau's motion to vacate his guilty pleas, for an evidentiary hearing, and for a new trial, on the ground that the pleas were made involuntarily and resulted from ineffective assistance of counsel. In support of the motion, Moreau has submitted the affidavits of his former

attorney, John Fitzgerald, his former co-defendant, Ralph Caron, his mother, Shirley Moreau, and himself. Based upon these affidavits and the memoranda submitted, I make the following findings of fact and rulings of law.

BACKGROUND

Moreau alleges that Attorney Fitzgerald failed to provide effective assistance from the inception of the attorney-client relationship through the time of the guilty pleas. Attorney and client first met in Superior District Court on the morning of October 3, 1985. Moreau had just been transferred from Springfield, where he had been arrested the previous day in connection with a housebreak in the Town of Warren.[1/]

1/ In his affidavit, Moreau states that he resisted advice of the Springfield police and refused to answer their questions or make a statement.

Attorney Fitzgerald had come to the courthouse with his then client Ralph Caron, who was also Moreau's brother-in-law and co-defendant.

Attorney Fitzgerald gave the following account in his affidavit. He spoke separately with Caron, Moreau, and the police at the station house. The police outlined for him the case against both Caron and Moreau, describing the circumstances of the assault. Although Fitzgerald states in his affidavit that the authorities were pressing him to advise both defendants to make complete disclosure of their involvement, I do not find this allegation to be credible. I also disbelieve Fitzgerald's statement that he advised both clients that a high bail was likely to be imposed unless they gave statements to the police. Caron gave the police a written statement. Fitzgerald then conferred with Moreau,

advising him that the police had been aware of all facts connected with the case even before Caron gave his statement. Following the advice of Attorney Fitzgerald and in his presence, Moreau gave the police a self-incriminating statement.

At the time Attorney Fitzgerald went to Spencer District Court, he understood and intended that he would represent Caron. However, he states that "by agreement, [he] spoke with and advised Mr. Moreau." Fitzgerald affidavit at 2. Fitzgerald continued to represent both Moreau and Caron until December, 1985, when he withdrew from the representation of Caron. On April 24, 1986, on the advice of Attorney Fitzgerald, Moreau pled guilty to the indictments in these cases in Worcester Superior Court.

In his affidavit, Moreau describes the problem areas in Fitzgerald's

representation as follows: Attorney Fitzgerald never discussed the strengths or weaknesses of the Commonwealth's case, nor did he tell Moreau that there might be a conflict of interest arising out of the joint representation of Caron and himself. Fitzgerald instructed Moreau on October 3 that the only way he could be released on bail that day would be to give the police a statement. Moreau's statement was presented to the Grand Jury, and indictments were returned. On April 24, 1986, when the case was to be tried, Attorney Fitzgerald met with Moreau briefly at the courthouse and advised him to plead guilty. Fitzgerald said that Moreau had no choice but to plead guilty, because his own statements would convict him if they went to trial. In addition, Fitzgerald admitted that he may have made a mistake in advising Moreau to give the statement. Moreau

states that he was never advised that he could present mitigating circumstances to the court at the sentencing stage. Likewise, Attorney Fitzgerald never informed him that he and the prosecutor had agreed upon a sentencing recommendation of twelve to twenty-five years. Instead, Fitzgerald had told him that the D.A. would recommend that amount, but that it could be reduced on appeal.

Because of the extensive plea colloquy, during which Moreau repeatedly affirmed his satisfaction with the advice of counsel and his understanding of the proceedings, I find his account of Attorney Fitzgerald's acts and omissions to be totally lacking in credibility.

When the guilty pleas were taken, the court conducted an extensive colloquy with Moreau. Among the many questions asked and answered were the following.

Q. All right, now are you satisfied with the amount of time your lawyer, Mr. Fitzgerald has spent with you going over this case and preparing it for trial?

A. Yes, your Honor.

Q. Are you satisfied with the advice he has given to you in connection with this matter?

A. Yes, your Honor.

Transcript at 1-10.

Moreau later indicated again his understanding that he was satisfied with counsel and that he was waiving his rights. Tr. at 1-15. After the sentence was pronounced, Moreau was again given the opportunity to ask questions of the court, but he declined.

DISCUSSION

Where a defendant has already pleaded guilty to a crime and subsequently asserts that he was denied the effective assistance of counsel, his claim must meet a two part test. First, he must

show that the conduct of his counsel during the course of the representation fell "below an objective standard of reasonableness," Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984), or was "measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Sefarian, 366 Mass. (1984). If he sustains this initial burden, he must also show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." U.S. v. Giardino, 797 F.2d 30 (1986), citing Hill v. Lockhart, 106 S. Ct. 366, 370 (1985). This court need not hold a hearing to determine whether the standard is met. Mass. R. Crim. P. 30(c)(3), 378 Mass. 901 (1979); Commonwealth v. McGann, 20 Mass. App. Ct. 59, 62-3 (1985).

Moreau has not sustained either part of his burden in this case. It is not clear, or even probable, that Attorney Fitzgerald conducted his representation of Moreau in an objectively unreasonable manner. If, as Fitzgerald stated in his affidavit, the police had a strong case against Moreau, the initial advice to give a statement was not necessarily beyond the realm of reasonable attorney conduct. After the statement had been given, it was not unreasonable for Fitzgerald to recommend that Moreau plead guilty.

As to the sentencing, Fitzgerald acted reasonably in entering into plea negotiations with the prosecutor. Moreau's sentence was considerably lighter than that imposed upon Caron, his codefendant. Furthermore, his sentence was the result of an agreed recommendation that had been made between

the prosecutor and Attorney Fitzgerald. It had been fully explained to Moreau and in the presence of the court, he expressed satisfaction with it.

ORDER

For the foregoing reasons, defendant's motion to vacate the guilty pleas, for an evidentiary hearing, and for a new trial, is hereby DENIED.

It is so ORDERED.

_____
James P. Donohue
Justice of the Superior Court

DATED: June 15, 1990

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
CRIMINAL NOS. 111225
111226
111227

COMMONWEALTH OF MASSACHUSETTS)
)
v.)
)
ROGER MOREAU)

COMMONWEALTH'S MOTION TO STAY PROCEEDINGS

Now comes the Commonwealth in the above-referenced case and respectfully requests that all proceedings be stayed until the United States Supreme Court takes action on a petition for a writ of certiorari to be filed by the Commonwealth, through the Attorney General. Pursuant to Supreme Court Rule 13, a party petitioning for a writ of

1991, Filed in Court 10/24
Allowed Donahue J.
Attest: Kevin M. Golden
Assistant Clerk-Magistrate

certiorari must do so within 90 days from entry of the order of the state court of last resort denying discretionary review. On July 30, 1991, the Supreme Judicial Court denied further appellate review of the Appeals Court decision in Commonwealth v. Moreau, 30 Mass. App. Ct. 677 (1991). Accordingly, the Commonwealth will file for a writ of certiorari on or before October 28, 1991. The Commonwealth requests that the stay remain in effect until either a denial of its petition for a writ of certiorari or until the United States Supreme Court takes final action in this case.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General

Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826
BBO #118180

JOHN J. CONTE
District Attorney for
Worcester County

Claudia A. Sullivan
Assistant District Attorney
Courthouse, Room 220
Two Main Street
Worcester, Massachusetts 01608
(508) 757-2786

Date: August 21, 1991

3914J

4393J

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 91-736

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

and

MOTION TO PROCEED IN FORMA PAUPERIS

---

* Daniel J. O'Connell, III
6 Beacon Street, Suite 900
Boston, MA 02108
(617) 227-4040

* Counsel of Record

32pp

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

No. 91-736

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Roger Moreau, by his attorney Daniel J. O'Connell, III, hereby moves this Court pursuant to Rule 39 of the Rules of the Supreme Court of the United States for permission to proceed in Forma Pauperis in opposition to the petitioner's Petition for Writ of Certiorari, and in any and all subsequent proceedings before this Court.

As grounds for this motion, respondent's affidavit in the form prescribed by Federal Rules of Appellate Procedure Form 4 is attached hereto.

As additional grounds, the respondent has been incarcerated and destitute since 1986. Respondent's family retained counsel to review and vacate the proceedings which led to defendant's guilty plea and incarceration in 1986; however, since the date counsel was hired, respondent's family's resources have been depleted and they are without funds to pay for the printing of briefs or fees for counsel.

For the foregoing reasons, it is requested that the Motion for Permission to Proceed in Forma Pauperis be granted and that

respondent be permitted to serve and file typewritten briefs, pursuant to Rule 39.5.

Leave for permission to proceed in Forma Pauperis has not been sought in any other court.

Respondent,
Roger Moreau,
By his attorney

Daniel J. O'Connell, III
6 Beacon Street
Suite 900
Boston, MA 02108
(617) 227-4040

CERTIFICATE OF SERVICE

I, Daniel J. O'Connell, III, hereby certify that the foregoing document was served upon the Commonwealth by mailing a true copy thereof, this 25th day of November 1991, as follows:

Paula J. DeGiacomo
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Daniel J. O'Connell, III

CA-4 AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS (Rev. 6-68)

COMMONWEALTH OF MASSACHUSETTS
~~United States of America~~

v.
ROGER MOREAU

SUPREME COURT OF THE
~~United States District Court~~

FOR THE

Affidavit in Support of Motion on Appeal in Forma Pauperis

I, Roger Albert McLean, being first duly sworn, depose and say that I am the defendant, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

☐ YES ☒ NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

[illegible]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

☐ YES ☒ NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

☐ YES ☒ NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

☐ YES ☒ NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SIGN ▶ Roger Moreau

SUBSCRIBED AND SWORN TO before me this

11 day of Nov, 1971.

Cynthia R. Pare

Let applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice of the ~~United States District Judge~~ Supreme Court

NO. 91-736

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

---

* Daniel J. O'Connell, III
6 Beacon Street, Suite 900
Boston, MA 02108
(617) 227-4040

* Counsel of Record

Question Presented

1. Whether the Court has jurisdiction to hear and decide this case pursuant to 28 U.S.C. §1257.

TABLE OF AUTHORITIES

ION IS NOT CONTINUOUS.

NO. 91-736

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

JURISDICTION

Respondent Roger Moreau argues that this Court lacks jurisdiction over this case pursuant to 28 U.S.C. §1257.

In its jurisdictional statement, the Commonwealth erroneously states that the Superior Court has stayed further proceedings "until this Court takes final action in this case . . .." (Pet., p.2.) The Superior Court's stay is actually in effect "until either a denial of [the Commonwealth's] petition for a writ of certiorari or until the United States Supreme Court takes final action in the case." (Pet., Appendix D; emphasis supplied.)

CONSTITUTIONAL PROVISIONS AND STATUTES

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

28 U.S.C. §1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . ..

whether Moreau had been denied effective assistance of counsel pursuant to Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974).

Statement of Facts

On October 2, 1985, Roger Moreau was arrested by the Springfield Police in connection with an incident that had occurred in the Town of Warren. He was initially brought to the Springfield Police Department where attempts were made to interrogate him over an extended period of time. Although the Springfield Police persistently advised him to make a confession, Moreau refused to make any statement. Custody of Moreau was transferred to the Warren Police and State Police early in the morning on October 3, 1985, and he was held and questioned until his eventual transportation to court that morning. During that period Moreau again refused to make any statement in response to repeated demands by the police. (Appendix A, Moreau Affidavit, submitted in support of Motion for New Trial.)

On October 3, 1985, Moreau was taken to Spencer District Court at approximately 9:00 a.m. Moreau's co-defendant Ralph Caron had arrived at the Spencer District Court accompanied by Attorney John Fitzgerald and Caron was arrested at Spencer District Court that morning in connection with the incident. (Appendix B, Fitzgerald Affidavit, submitted in support of Motion for New Trial.)

Attorney John Fitzgerald, who had been retained to represent Moreau, appeared at the courthouse that morning and conferred with him regarding the incident. During their conference, Moreau confided certain information to Attorney Fitzgerald regarding the details of the alleged offenses and he reiterated to Fitzgerald that he did not want to make any statement regarding the incident. He was advised by Fitzgerald that he would be held on high bail if he did not make a statement. (Appendices A and B.)

On October 3, 1985, Fitzgerald was simultaneously representing Ralph Caron. Caron was also advised by Fitzgerald to make a statement to the Warren Police at the courthouse. At approximately 11:30 a.m., Caron gave a statement in accordance with Fitzgerald's advice which incriminated him and Moreau. Fitzgerald subsequently counseled Moreau to make a statement if he wanted to be released on bail. He never told Moreau that he would be waiving his privilege against self-incrimination and thereby providing the police with sufficient evidence to convict him of the serious charges for which he had been arrested. Fitzgerald never apprised Moreau of the penalties applicable to convictions for those charges. In accordance with Attorney Fitzgerald's advice, Moreau made a statement at approximately 1:15 p.m. which incriminated him and Caron. Moreau was subsequently released on bail that evening and appeared again in Spencer District Court

on October 4, 1985 for arraignment. Despite the fact that Moreau had been arrested and was held at court for the entire day on October 3, 1985, he was not arraigned on that day. (Appendix A.)

Direct indictments were returned against Moreau and Caron on January 15, 1986. Moreau's statement was presented to the Grand Jury which returned the indictments. Moreau was indicted on three offenses: armed burglary, assault and battery by means of a dangerous weapon, and assault and battery.

On April 24, 1986, Roger Moreau pleaded guilty upon the advice of Fitzgerald and, upon joint recommendation of Fitzgerald and the Commonwealth, was given a 12 to 25 year sentence on armed burglary, a sentence which exceeded the sentencing guidelines.

During the course of his representation of Roger Moreau from October 3, 1985, to the Court's imposition of sentence on April 24, 1986, Fitzgerald never advised Moreau about a conflict of interest arising from his joint representation of co-defendants Moreau and Caron. At no time did Fitzgerald ever discuss with Moreau the sufficiency of the Commonwealth's case against Moreau nor the possibility of filing a motion to suppress the statement given at Spencer District Court. In addition, Fitzgerald never discussed with Moreau the possible sentences for the alleged indictment until April 24, 1986,

when Fitzgerald told him at court that his only choice was to plead guilty. At no time did Moreau understand that Fitzgerald had entered into a joint recommendation for a sentence that exceeded the sentencing guidelines.

SUMMARY OF ARGUMENT

Because the decision below is a non-final interlocutory decision of a lower level state appellate court, the requirements for a writ of certiorari set forth in 28 U.S.C. §1257 have not been met. The exceptions to the finality requirement described in Cox Broadcasting Corp. v.Cohn, 420 U.S. 469 (1975), do not apply because both parties will have a right to appeal after the trial court conducts the evidentiary hearing on remand. The constitutional issues will not "escape" review, as in Pennsylvania v. Ritchie, 490 U.S. 39 (1987).

If the Court were to grant certiorari and decide the issue raised by the Commonwealth, a hearing before the trial court would still be required. Many of the ineffective assistance of counsel issues arose after arraignment, and there is no question that Moreau is entitled to a hearing on these issues pursuant to Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974). As such, the Appeals Court decision rests on adequate and independent state grounds and must not be disturbed.

At the very minimum, Moreau must be permitted to create an evidentiary record in order to afford the Commonwealth's highest court and, if appropriate, this Court, the opportunity for a complete and intelligent review of the issues. California v. Rooney, 107 S.Ct. 2852 (1987).

I. THE COURT LACKS JURISDICTION TO HEAR AND DECIDE THIS CASE PURSUANT TO 28 U.S.C. §1257

The Commonwealth improperly invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257, in that the decision of the Appeals Court: A) is not a final judgement of the state's highest court; and B) rests on adequate and independent state grounds. For these reasons, certiorari must be denied.

A. The Opinion of the Massachusetts Appeals Court Is Not a Final Judgment of the State's Highest Court

The Commonwealth admits that the opinion of the Appeals Court is interlocutory in nature. Normally, the Supreme Court "is without jurisdiction to review an interlocutory judgment. . .." Pennsylvania v. Ritchie, 480 U.S. 39, 47 (1987). The Commonwealth, however, asserts in a footnote (Petition, p.11) that the case is "within one of the well-established exceptions to the finality doctrine", citing Pennsylvania v. Ritchie, id,

and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).[1]/ However, the Cox Broadcasting Corp. exception held to be controlling in Ritchie is inapplicable here.

First and foremost, Ritchie was an appeal from the decision of Pennsylvania's highest court, the Supreme Court. Id. at 46. By contrast, the Commonwealth in this case is seeking review of the decision of the Massachusetts Appeals Court, a mid-level appellate court. The State's highest court, the Supreme Judicial Court, refused further appellate review at this stage, which is not surprising in view of the number of issues which the Appeals Court directed the Superior Court to address on remand. (Petition, 16A - 18A.)

Second, this is not a case (as was Ritchie), in which "the Sixth Amendment issue will not survive for this Court to review, regardless of the proceedings on remand." Id. at 48, citing Cox Broadcasting Corp., id., at 481. This Court in Ritchie was presented with a Sixth Amendment Confrontation Clause issue decided by Pennsylvania's highest court after a full trial on the merits. This Court concluded that, based on the "unusual facts of [the] case, the justifications for the finality doctrine would be ill-served by another round of litigation on an issue

---

[1]/ The Commonwealth is apparently relying solely on just one of the Cox Broadcasting Corp. exceptions which was found to be controlling in Ritchie; the other three categories of exceptions to the finality requirement are not applicable.

that has been authoritatively decided by the highest state court." In Moreau, there has been no trial on the merits, no hearing on the Fifth and Sixth Amendment issues and no authoritative decision by the state's highest court.

On remand, the trial court was directed to conduct a hearing to determine whether Moreau should be permitted to withdraw his guilty plea on the grounds of ineffective assistance of counsel, utilizing the two-pronged test set forth in Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974). The Appeals Court noted that Moreau was alleging three claims of ineffective assistance: poor advice prior to trial, at the plea and at sentencing. (Petition, p.14A.) The subsidiary issues include the strength of the Commonwealth's case at the time Moreau was advised by counsel to make a confession, the investigation (if any) undertaken by counsel to verify the information given to him by the police, and whether Moreau was prejudiced by his attorney's obvious conflict of interest. Only after these issues are decided will the case be ripe for full appellate review.

Whoever does not prevail at the hearing will have a right to appellate review. The Commonwealth has a statutory right to appeal after the hearing. M.G.L. c.278, §28E; Mass.R.Crim.P. Rule 15. This case has obviously not reached the stage which, as in Ritchie, a

conviction or acquittal after retrial could preclude an appeal.

B. The Decision of the Appeals Court Rests On Adequate and Independent State Grounds

The Commonwealth asserts (once again, in a footnote) that the Appeals Court provided no "clear statement" that its decision rested on adequate and independent state grounds, citing Michigan v. Long, 463 U.S. 1032 (1983). The Commonwealth incorrectly argues that the Appeals Court's opinion cites only two inapposite state court decisions, and that the Court's decision was actually based on an "incorrect understanding" of Escobedo v. Illinois, 378 U.S. 478 (1964) and United States v. Gouveia, 467 U.S. 180 (1984). Therefore, the Commonwealth erroneously concludes that the Supreme Court has jurisdiction to hear this case.

In arguing that there is no clear statement that the decision is based on state law, the Commonwealth ignores the fact that the opinion is written by a mid-level appellate court on an interlocutory, non-final proceeding which is in its initial stages. The Appeals Court should not be expected to anticipate that its opinions will be subject to direct scrutiny by the United States Supreme Court, whereas the state's highest court can expect to be held to this standard.

In its Petition, the Commonwealth focuses exclusively on the pre-indictment confession, failing to note that this is but one of the three ineffective assistance claims.[2] If the Supreme Court were to reverse this portion of the decision of the Appeals Court, Moreau would still be entitled to a hearing as a matter of law on his ineffective assistance claims which occurred after arraignment, at the plea stage and at his sentencing. Commonwealth v. Saferian, id. This hearing will, in all likelihood, result in an appeal by one or both parties. This will occur even if the Supreme Court grants certiorari, and would be a result which is the opposite of that deemed desirable by the Ritchie decision. Review at this time would be "speculative and premature". California v. Rooney, 107 S.Ct. 2852 (1987).

There is no reason to overrule the decision of the Appeals Court. The Commonwealth presumes that the Appeals Court misapplied Escobedo and Gouveia by extending the reach of the Sixth Amendment right to counsel to a pre-adversarial stage of the proceeding. This argument ignores the fact that the Appeals Court recognized that

---

2/ Even if the Appeals Court arguably erred in holding that Moreau was entitled to effective assistance of counsel prior to arraignment, the pre-indictment ineffective assistance claim could also be considered in determining whether Moreau's confession was voluntary pursuant to Escobedo v. Illinois, id., and Miranda v. Arizona, 384 U.S. 436 (1966). The factual inquiry remains the same in either instance and is dictated by state - not federal - law. Commonwealth v. Saferian, id.

"[t]he first question is whether . . . the defendant's written statement was made before the right to counsel attached." (Petition, 4A.) The Court duly noted that the right to effective assistance of counsel is "only as broad as the right to counsel on which it rests", citing Commonwealth v. Jones, 403 Mass. 279, 286 (1988). The Court went on to state that the Sixth Amendment right to counsel "may not yet have matured" at the time Moreau confessed. (Emphasis supplied.) Because Moreau argued on appeal that the functional equivalent of adversary judicial proceedings had been initiated[3], it is reasonable to construe the Appeal Court's refusal to unequivocally state that adversary judicial proceedings had not commenced, to mean that such proceedings may actually have commenced. In any event, this is a question of state law which should be decided by the state's highest court.

For the foregoing reasons, the opinion of the Appeals Court rests on adequate and independent state grounds. Alternatively, as the Commonwealth is seeking review of a decision by a court other than the state's highest, the "clear statement" of state grounds required by Michigan v.

---

[3]/ This argument is based on Moreau's extended pre-statement custody, his presence in court the entire day of October 3, 1985, and the requirement of prompt arraignment set forth in Mass.R.Crim.P. Rule 7.

Long, id., should be relaxed, in order to avoid the unnecessarily duplicative proceedings and uncertainty which the rule was intended to remedy.

CONCLUSION

For the foregoing reasons this Court lacks jurisdiction pursuant to 28 U.S.C. §1257 and the Petition for Writ of Certiorari must be denied.

Daniel J. O'Connell, III

Dated: November 25 1991
Boston, Massachusetts

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
NOS: 86-111225,
86-111226, 86-111227

COMMONWEALTH)
)
v.)
)
ROGER MOREAU)

AFFIDAVIT

I, Roger Moreau, on oath do depose and state that:

1. I am the defendant in the above-captioned case and I am presently incarcerated at the Massachusetts Correctional Institute located at Lancaster, Massachusetts.

2. On October 2, 1985, at approximately 11:00 p.m., I was arrested by Springfield Police Officers and taken to the Springfield Police Station for an incident that had occurred in Warren, Massachusetts.

3. While I was detained at the Springfield Police Station for an extended period, I was repeatedly questioned by at least four police officers who told me that I should admit to being involved in a house break in Warren. I refused to make any statement in response to the officers' demands.

4. I was subsequently transferred to the custody of other police from Warren and to the state police. I was repeatedly questioned by several officers at the different locations who continued to state that I should confess and make a statement. I refused to make any statement in response to the officers' demands.

5. I was subsequently taken by the police to the Spencer District Court on the morning of October 3, 1985, at approximately 9:00 a.m., where I remained in custody.

6. I met Attorney Fitzgerald at the courthouse that morning as a result of my mother having contacted him to represent me. He agreed to represent me at that time and I confided to Attorney Fitzgerald that morning concerning my involvement in the incident in Warren. He was also representing Ralph Caron at that time. At some point, before 11:30 a.m., I entered the courtroom with Attorney Fitzgerald and I heard someone say "looks like a $100,000. bail." I did not see any judge in the courtroom at that time.

7. When I conferred with Attorney Fitzgerald during the morning on October 3, 1985, in the courthouse, he never told me that there might be any conflict of interest in his representation of Ralph Caron and me. He never told me what Caron would say in terms of making a statement nor did he tell me what Caron said before I gave a statement at approximately 1:15 p.m. that day.

8. Before I gave a statement on October 3, 1985, Attorney Fitzgerald told me that it would be in my best interest to make a statement and that it might result in a low bail. The police had told me that "the only way you're going today is if you make a statement." Attorney Fitzgerald never told me that I would be relinquishing my right against self-incrimination and that my statement itself would constitute sufficient evidence for the Commonwealth to secure a conviction which could result in imprisonment. He never discussed with me the nature or sufficiency of any evidence that the Commonwealth had at that time regarding my alleged involvement in the incident.

9. At approximately 1:15 p.m. on October 3, 1985, as the result of Attorney Fitzgerald's advice, I made a statement to the police at the Spencer District Courthouse regarding my involvement in the alleged incident, and I signed a statement prepared by one of the officers, a copy of which is attached as Exhibit A.

10. Although I was detained at the Spencer District Court from approximately 9:00 a.m. on October 3, 1985, for the entire day, I was not formally arraigned until the following day, October 4, 1985.

11. The statements made by Ralph Caron and me were presented to the Grand Jury which returned indictments against me on or about January 15, 1986, charging armed burglary, assault and battery by means of a dangerous weapon and assault and battery.

12. I was represented by Attorney Fitzgerald at all times from October 3, 1985, to and including April 24, 1986, when I pleaded guilty and sentence was imposed. At no time did Attorney Fitzgerald ever discuss the strengths or weaknesses of the Commonwealth's case against me nor did he ever discuss the filing of any motion to suppress my statement or any other trial strategy.

13. When I arrived at the Worcester Superior Court on April 24, 1986, I met briefly with Attorney Fitzgerald. He left me at one point and returned to say that "It looks like a 5 to 7 year sentence." When I told him that I was not expecting that, he said that he would confer with the district

attorney. He returned and said that the district attorney was asking for a 12 to 25 year sentence if I would plead guilty. I was told that I would get an 18 to 30 year sentence if I took the case to trial. When I told him that I wanted to take the case to trial, Attorney Fitzgerald said that we would not win. He said that "the statements you made will convict you." When I asked him why he told me to make a statement to the police, he said "I may have made a mistake. You can blame me, but I thought I was doing the right thing."

Attorney Fitzgerald also said that I should take the 12 to 25 year sentence because I would get 18 to 30 years if we went to trial. When I asked him if the trial could be postponed so that I could collect my thoughts, he responded that "The trial begins today. Your only choice is to plead guilty."

Attorney Fitzgerald also told me before the hearing that day that "just because the D.A. recommends the 12 to 25 years, doesn't mean the judge has to go along with it. The judge could lower that sentence to whatever he feels is appropriate." He said he could get the sentence reduced on appeal. Attorney Fitzgerald never told me prior to the actual hearing that he had agreed to a joint recommendation.

14. At no time prior to the imposition of the sentence did Attorney Fitzgerald ever tell me that I had the right to present mitigating circumstances to the Court for the purpose of the Court's discretion in imposing sentence. He never discussed possible penalties with me prior to April 24, 1986, other than his comment to me once that "if everything goes bad, you might do a year."

Sworn to under the pains and penalty of perjury this 23rd day of March, 1990.

Roger Moreau

Roger Moreau

(1)

03 Oct 1985
1315 HRS

I Roger A Moreau D-O-B. 2-1-63 SS # 030522024 10 Wolcott St. Springfield make this statement of my own free will without promise or threat of arrest being advised of my Rights & in the presence of John F Fitzgerald 1350 Main St Springfield. On Sept 28 1985 myself Ralph Caron & Tadeshi Guest I have know Tadeshi Guest for approx 2 years & know that to be his Name, We were going to Warren to a house to break into to get a safe, This is the same house that Ralph & Tadeshi had taken a big free standing Brass phone, This house is a big White house with pool with a type of marble fence We went to the back of the house Ralph had a hand gun that Ralph said he had gotten from Tadeshi, I had a small knife & Tadeshi had Nunchucks home made. We went into the house through an unlocked back sliding back door. Once in the house we knew someone was home due to the smell of burning wood. We looked around for money drugs

RM

ANYTHING WE COULD TAKE. ② WE ALL WENT
UP STAIRS & FOUND A MAN & A LADY IN
ED SLEEPING. WE TALKED ABOUT IT OUTSIDE
THE ROOM, WE WENT INTO THE ROOM &
HE LADY WOKE UP & SCREAMED I HIT THE
OMEN PRETTY HARD, WHEN THE MAN WOKE
UP & STARTED FIGHTING WITH TADASHI
HILE THIS WAS GOING ON I TOOK THE
OMEN OUTSIDE IN THE HALLWAY & I TOLD
R TO LAY DOWN ON THE FLOOR, I LOOKED
THE BEDROOM & SAW RALPH W/ A GUN
PULLED THE HAMMER BACK TO MAKE A
OUND & HAD IT IN FRONT OF THE MAN
E MAN & THE WOMEN WERE PUT IN THE
CK BEDROOM, TADASHI WENT IN WITH MY
FE & TOLD THEM HE WOULD SLASH THEM
DASHI & I STARTED LOOKING EVERYWHERE
R STUFF. MOST OF THE TIME RALPH WAS
THE BEDROOM WATCHING THE MEN & WOMEN
DASHI WENT TO WATCH THE PEOPLE & RALPH
I CONTINUED TO LOOK AROUND. TADASHI
ME OUT OF THE ROOM & RALPH WENT TO
ATCH THE PEOPLE. RALPH TOLD ME TO GET
E CAR I WENT & GOT THE CAR & WE LOADE
AT WE HAD IN THE CAR WE TOOK BRASS STATUES
JACKETS & SMALL T.V & VACUME CLEANER, CAS
M THE MANS WALLET APPROX $80.00 & "T" FROM THE
OMEN'S PURSE AFTER HE DUMPED IT ALL ON
E FLOOR, & A CASE OF BOOZE. RALPH

R.M.

told us He told the man & lady to
get under ~~the~~ Bed. Ralph ran up
& check on the man & lady &
then we jumped into the CAR &
left we went to Igdoshi's house
& split the stuff ← Roger Moreann

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT
NOS. 86-111225.
86-111225, 86-111227

COMMONWEALTH

VS.

ROGER MOREAU

AFFIDAVIT OF JOHN F. FITZGERALD

I, John F. Fitzgerald, member of the Bar of the Commonwealth of Massachusetts being duly sworn and under oath do depose and state as follows:

That on or about October 2nd or 3rd I was contacted by Ralph Caron who was a then current client of mine on criminal matters then pending in Hampden County. He had been requested by the Warren Police to come to the Spencer Court in connection with a matter they were investigating. He was aware that they were already holding his friend, Roger Moreau, in custody.

On October 3, 1985 I drove to the Spencer District Court with Mr. Caron. During our trip he related to me that he wanted to protect Roger Moreau and was prepared to accept the entire responsibility for any crimes they were being charged with. He insisted that he wanted to do everything he could to effect Mr. Moreau's release. I appeared at the courthouse and had a conversation with representatives of the Warren Police who outlined the case against both Caron and Moreau. They described the circumstances of the assault and the allegations of what occurred on September 29, 1985 in Warren.

As a result of my conversations with police representative, I was aware that due to the serious nature of the cases that both defendants would likely be subject to a high bail request unless each cooperated and gave a statement. The authorities were pressing me to advise both persons to make a complete disclosure of their involvement.

I then advised each Defendant that unless he made a statement it way my judgment that a high bail was likely to be imposed.

After advising Mr. Caron to make a statement and to cooperate with the Police, I also conferred with Roger Moreau and likewise advised him that the Police were well aware of all facts connected with their case even prior to Mr. Caron's written statement. He agreed to make a written statement. I was present while each made his statement.

At that time I had gone to Spencer with the understanding that I was to represent Mr. Caron, however, by agreement, spoke with and advised Mr. Moreau.

Both men were held on bail of $500.00. Mr. Moreau was held overnight until the following day when I believe his family posted bail. Caron was released immediately since he had the necessary bail money.

Thereafter, the mother of Mr. Moreau kept requesting I represent her son. I arranged with Mr. Caron's consent to have Atty. Leonard Skvirsky of 20 Maple Street, Springfield, MA talk with Caron whereupon he agreed to accept Caron's case. I do not recall the exact date Atty. Skvirsky filed his appearance.

I represented both Defendants in the Spencer District Court up until December, 1985 when I withdrew from the representation of Mr. Caron. I continued to represent Mr. Moreau in the Worcester Superior Court when he was indicted and I counselled him to plead guilty to the offenses on April 24, 1986.

Signed under the pains and penalties of perjury this 23rd day of May, 1989.

John F. Fitzgerald

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss May 23,1989

Then personally appeared John F. Fitzgerald and acknowledged the foregoing to be true to the best of his knowledge and belief, before me

Judith A. Downs

Notary Public
My Commission expires: 2-1-96

NO. 91-736

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner
v.
ROGER MOREAU,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT
and
MOTION TO PROCEED IN FORMA PAUPERIS

CERTIFICATE OF MAILING

I, Daniel J. O'Connell, III, attorney for the Respondent in the above-captioned matter, hereby state of my own personal knowledge that on November 25, 1991, twelve copies of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Massachusetts Appeals Court and Motion to Proceed in Forma Pauperis were deposited in the United States Mails in Boston, Massachusetts, first-class postage prepaid, addressed to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E., Washington, D.C. 20543.

Daniel J. O'Connell, III
6 Beacon Street, Suite 900
Boston, MA 02108
(617) 227-4040

SUFFOLK, SS. November 25, 1991

I certify that Daniel J. O'Connell, III, appeared before me on this date and signed the above statement.

Notary Public - Commonwealth of Massachusetts
My Commission Expires: 3/14/97

O'CONNELL & POLLENZ
ATTORNEYS AT LAW

DANIEL J. O'CONNELL, III
KENNETH R. POLLENZ
ROBERT T. NAGLE
JOHN B. SHEEHAN *

* ALSO ADMITTED IN NEW YORK

6 BEACON STREET
SUITE 900
BOSTON, MASSACHUSETTS 02108

TEL. (617) 227-4040
FAX (617) 227-3388

November 25, 1991

Joseph F. Spaniol, Jr.
Clerk of Court
Supreme Court of the United States
Supreme Court Building
One First Street, N.E.
Washington, D.C. 20543

RE: Commonwealth v. Roger Moreau
Docket No. 91-736

Dear Mr. Spaniol:

Enclosed for filing in the above-referenced matter, please find twelve (12) copies of the Brief of Respondent in Opposition to the Petition for Writ of Certiorari to the Massachusetts Appeals Court with a Certificate of Service.

Also enclosed is Respondent's Motion to Proceed in Forma Pauperis.

Very truly yours,

Daniel J. O'Connell, III

DJO'C/bf

Enclosure

cc: A.A.G. Paula DeGiacomo

No. 91-736

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

ROGER MOREAU,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

CERTIFICATE OF SERVICE

I, Paula J. DeGiacomo, Assistant Attorney General, do hereby certify that on this 28th day of October, 1991, I have given notice of the filing of the within Petition for Writ of Certiorari to the Massachusetts Appeals Court and Appendix, by mailing copies of same, first class, postage prepaid, to Daniel J. O'Connell, III, O'Connell & Pollenz, 6 Beacon Street, Boston, Massachusetts 02108, (617) 227-4040.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General

Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826

No. 91-736

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

ROGER MOREAU,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

CERTIFICATE OF MAILING

I, Paula J. DeGiacomo, Assistant Attorney General, hereby state of my own personal knowledge that on October 28, 1991, copies of the Petition for Writ of Certiorari to the Massachusetts Appeals Court in the above-captioned matter were deposited in a United States Mail Box in Boston, Massachusetts with first class postage prepaid, addressed to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E., Washington, D.C. 20543.

Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2086

Suffolk, ss. October 28, 1991

I certify that Paula J. DeGiacomo appeared before me on this date and signed the above statement.

W. Bradford Cleno
Notary Public

My commission expires: March 6, 1998